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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 275.

LAWRENCE DYER,
Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,
Appellees.

AFFIDAVITS AND BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

AFFIDAVITS IN SUPPORT OF MOTION TO DISMISS APPEAL.

State of Wisconsin }
County of Rock } ss.

Maurice E. Christenson, E. P. Gharrity, Stuart D. Klinger, Jess J. Phillips and John T. Wootton, being first duly sworn, on oath each for himself says that he is now, and was on the 15th day of December, 1947, a duly elected and acting member of the City Council of Beloit, Wisconsin; that the said City of Beloit operates under the

City Manager plan of government, and its council, in which all legislative powers of the city vest, consists of five members; that he is not an attorney-at-law, and in the discharge of his legislative duties necessarily acts in accordance with the judgment and advice of the attorneys employed by the city in all matters involving questions of law;

That shortly before the 15th day of December, 1947, he and the other members of the City Council were advised that the attorneys representing the City of Beloit in this litigation had concluded, as the result of their further study of the law, in preparation of appellees' brief, to be submitted to this Court, that, in their judgment, the ordinance clause under attack in this case was, in all probability, a violation of the Interstate Commerce Clause of the Constitution of the United States;

That this affiant accepted the judgment of the city's attorneys in the matter, and consulted with the other members of the City Council regarding a possible change in the ordinance to conform with the views of such attorneys; that, as the result, the members of the City Council determined to adopt an amendment to the existing ordinance, embodying the suggestions contained in the model milk ordinance recommended by the United States Public Health Service; that such amendment was passed on December 15, 1947, and, as this affiant is informed and believes, the appellant, Lawrence Dyer, upon the next day applied for and received a license to deliver and sell milk in the City of Beloit, hauling the same from the pasteurization plant of the Dean Milk Company at Chemung, Illinois, a distance of twenty-five to thirty miles from the City of Beloit, and that the said Lawrence Dyer has at all times since said date continued to sell such milk in the City of Beloit, all in conformity with the ordinance as amended;

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That the ordinance, as amended, represents the settled legislative policy of the City of Beloit; that there is no purpose on the part of this affiant, as a member of the City Council of Beloit, and, in his judgment, upon the part of any other member of said City Council, to repeal or modify the ordinance in any way detrimental to the right of the said Lawrence Dyer to continue the sale of milk in the City of Beloit in the manner he is now doing, or to deprive anyone else of the same opportunity under the ordinance, as amended; that this affiant believes that he would be committing a fraud upon this Court, as well as upon the said Lawrence Dyer, or any other milk dealer similarly situated, and would be guilty of the utmost treachery and deceit, if he were to entertain any thought of changing the ordinance to deprive the said Lawrence Dyer of a license to sell milk in the City of Beloit; that the charge made in the affidavit of the said Lawrence Dyer upon his motion to deny appellees' motion to dismiss the appeal in this case and in the brief accompanying said motion, to the effect that the City Council of Beloit, Wisconsin, intends to deprive the said Lawrence Dyer of a license, after the dismissal of the appeal, by modifying the amended ordinance, is untrue in every respect.

Maurice E. Christenson,
Jess J. Phillips,
Stuart D. Klinger,
E. P. Gharrity,
John T. Wootton.

Subscribed and sworn to before me this 19th day of January, 1948.

Jane Finnegan,
Notary Public, Rock County, Wisconsin.

My commission expires June 4, 1950.

(Seal)

State of Wisconsin } ss.
County of Rock }

Stanley J. Goldschmidt, being first duly sworn, on his oath says that at all times since the 1st day of September, 1945, he has been the duly appointed and acting Sanitarian of the City of Beloit, under the general direction of the City Health Officer, and in such capacity has had charge of the issuance of milk and other food licenses in the City of Beloit;

That all milk and other food licenses issued by the City of Beloit are upon the same printed form, and bear in printed words upon the face thereof the following phraseology:

"Within this City, subject to the ordinances thereof and to the laws of the State.

"Unless previously relinquished or revoked."

That the license form delivered to Lawrence Dyer under date of December 16, 1947, bearing the foregoing phraseology, does not differ in any respect from any other license form delivered to the other milk dealers and purveyors of food in the City of Beloit;

That the license issued to the said Lawrence Dyer expires on June 30, 1948, as do all other milk licenses under the terms of the ordinance; that all milk licenses are issued for a period of one year, and expire on the 30th day of June of the subsequent year; that the license issued to Lawrence Dyer is in all respects in the same category as the licenses issued to the other milk dealers of the city;

That the said Lawrence Dyer specifically applied for a license to deliver to the City of Beloit for sale pasteurized milk received by him from Dean Milk Company at its pasteurization plant in Chemung, Illinois; that he has not applied for a license to deliver milk from any pasteurization plant located in the State of Wisconsin; that since receiving his license he has sold no milk in the City of

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Beloit except that received from the Chemung plant of the Dean Milk Company; that he has never indicated a purpose to do otherwise than sell the milk purchased by him from the Dean Milk Company in the City of Beloit; that he has advertised in the local newspaper the fact that the milk of the Dean Milk Company was now on sale in the City of Beloit; that, as this affiant is informed and believes, there is no pasteurization plant operated by the Dean Milk Company in the State of Wisconsin;

That, under the amended ordinance, it was unnecessary for this affiant, as City Sanitarian, or for his assistant, to inspect farms furnishing milk to the pasteurization plant of the Dean Milk Company; that it was merely his duty to ascertain that such milk was produced, processed and delivered under properly enforced laws, regulations and ordinances equivalent to the Beloit ordinance; that in the matter of appellant's application for a license, this affiant satisfied himself that these requirements of the amended ordinance of Beloit were met, and thereupon issued a license to the appellant; that, in the exercise of his official duties, this affiant has become acquainted with the business activities of the said Lawrence Dyer; that the said Lawrence Dyer is solely engaged in delivering to the City of Beloit, Wisconsin, the City of South Beloit, Illinois (which adjoins the first city), and stores lying in the environs of said two cities, the milk produced by the Dean Milk Company; that his business activities are wholly limited to the area described, and do not embrace any city in the State of Wisconsin, except the City of Beloit.

Stanley J. Goldschmidt.

Subscribed and sworn to before me this 20th day of January, 1948.

E. J. Caskey,
Notary Public, Rock County, Wisconsin.

My commission expires April 22, 1951.

(Seal)

State of Wisconsin }
County of Rock } ss.

A. D. Telfer, being first duly sworn, on oath says that he is the duly appointed and acting City Manager of the City of Beloit, Rock County, Wisconsin;

That shortly after the 16th day of December, 1947, a letter addressed by Helen Newman, librarian of the Supreme Court of the United States, to the City Council of the City of Beloit, requesting a statement of the legislative history of the ordinance clause under attack in this case, was handed to this affiant for attention;

That on the 26th day of December, 1947, he addressed to the said Helen Newman a letter setting forth the legislative history of the ordinance as he was able to compile it from the records of the City of Beloit.

A. D. Telfer.

Subscribed and sworn to before me this 19th day of January, 1948.

Jane Finnegan,
Notary Public, Rock County, Wisconsin.

My commission expires June 4, 1950.

(Seal)

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ARGUMENT.

INTRODUCTORY STATEMENT.

The appellant, Lawrence Dyer, before the commencement of this suit applied to the City of Beloit, Wisconsin, for a license to sell pasteurized milk in said city. He stated, at the time of making the application, that he proposed to purchase pasteurized milk at the dairy of Dean Milk Company at Chemung, Illinois, and haul the same to Beloit, where he proposed to make sales to the retail trade. The City declined to give him a license, upon the ground that its milk ordinance provided that "no pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit" (R. 22). Chemung, Illinois, is between twenty-five and thirty miles from the point indicated in the ordinance (R. 8).

The appellant then filed a petition for a Writ of Mandamus in the Circuit Court for Rock County, Wisconsin, to compel the issuance of a license. After issue joined and a trial, the Circuit Court dismissed the petition and entered judgment for the defendants. Upon appeal, the Supreme Court of Wisconsin affirmed the judgment of the lower court. An appeal was then taken by Dyer to this Court.

While the appeal was pending in this Court, the attorneys representing the defendants in the litigation advised the members of the City Council of Beloit that they had concluded, as a result of their further study, that the ordinance clause above given was in violation of the Interstate Commerce Clause of the Constitution of the United States. Thereupon, on December 15, 1947, the City Council passed an amendment to the ordinance, in response to

the judgment and advice of its attorneys. The amendment provides that the ordinance shall not be construed to prohibit the sale within the City of Beloit of pure, wholesome pasteurized milk within the course of interstate commerce, if produced, processed and transported under laws, regulations and ordinances equivalent to the requirements of the Beloit ordinance.

The appellant applied for and received a license to sell milk in the City of Beloit immediately after the passage of the amendment, and at once commenced the sale of milk in Beloit, hauling the milk from the pasteurization plant of Dean Milk Company at Chemung, Illinois. He has since continued to do so. He has, therefore, accomplished the full purpose of his lawsuit.

He now claims, however, that a controversy still exists between him and the appellees. He complains that the license issued to him contains the following objectionable clause:

> "Unless previously relinquished or revoked. This license expires June 30, 1948."

The appellant is grasping at straws. The Beloit milk ordinance provides that all licenses issued thereunder shall expire on June 30th of each year (R. 13). The ordinance also provides the conditions under which a license may be revoked (R. 23). All licenses issued by the City of Beloit contain the phraseology to which the appellant now objects.

The appellant also contends that a controversy still exists, because the license and ordinance do not permit him to sell or distribute milk within the course of intrastate commerce. The appellant has no complaint upon this score, because he did not apply for a license to sell milk in intrastate commerce. His application specifically

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states that he proposes to transport milk from Illinois to Wisconsin for sale at retail stores in Beloit. He asserts no intention to make future sales of milk delivered by him in Beloit from other points in Wisconsin. He deals exclusively in the sale of Dean's milk. The Dean Milk Company has no plant in this State. The appellant does not propose to sell milk except within the course of interstate commerce.

In his effort to demonstrate that this case is not moot, appellant attacks the integrity and good faith of the City of Beloit and particularly its councilmen. He claims that they are so lacking in character and integrity that they will repeal the amended ordinance after the appeal to this Court is dismissed, and thereby leave him without adequate redress for the wrong inflicted. The bases for this fanciful conclusion are a newspaper account of a public meeting and remarks of counsel contained in a brief filed in this case in the Supreme Court of Wisconsin. The answer is that the elected representatives of the people of Beloit on their City Council are men of character, integrity and intelligence. They understand fully their moral obligations, and intend to keep them. Mr. Dyer may continue to sell his milk in Beloit as long as he wishes, provided it is produced, processed and transported under other regulations equivalent to those in the Beloit ordinance.

In a further desperate effort to carry his point, the appellant charges, upon information and belief, that the City did not respond to a request of the Librarian of this Court for information respecting the history and background of the ordinance. This statement is contained in an affidavit of the appellant made on January 6, 1948, in connection with his motion to deny appellees' motion to dismiss the appeal. Had the appellant enquired, he would have learned that the City Manager of Beloit did furnish

the information requested in a letter sent by him on December 26, 1947.

I.

AMENDMENT OF ORDINANCE HAS RENDERED THE CASE MOOT.

The appellant has obtained everything he requested as a result of the amendment of the ordinance. Whether this Court affirms or reverses the judgment of the Supreme Court of Wisconsin, the appellant has the license he sought, and he will continue to have such license as long as he wishes, and complies with the various provisions of the ordinance, as now written.

In Brownlow v. Schwartz, 261 U. S. 216, 67 L. ed. 620, 43 S. Ct. 263, the defendant in error (petitioner below) filed a petition for a writ of mandamus, requiring respondents to issue a building permit to erect a building for business purposes. The lower court entered judgment dismissing the petition. Upon appeal, the Circuit Court of Appeals reversed the judgment and remanded the cause, with directions to issue the writ, as prayed. Following this, a writ of error was allowed. After the decision of the Circuit Court of Appeals, and before the allowance of the writ of error, a permit was granted and the building was erected. The Court, in remanding the case, with directions to dismiss the bill, said:

> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly void an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists

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is a proceeding which this court uniformly has declined to entertain."

In the case of Tabor v. Hipp, 136 Ga. 123, 70 S. E. 886, the plaintiffs, claiming to be the duly constituted registrars of Gilmer County, Georgia, sought a writ of mandamus against the ordinary of that county to compel him to deliver to them certain books and documents for use in connection with their official work. The trial court granted the writ. Later it denied a motion for a new trial upon the ground that the books and documents had been delivered, the registrars had completed their work and had returned them to the defendant. Upon appeal, the Supreme Court of Georgia ordered the writ dismissed upon the ground that the case was moot. The Court said that there was no existing controversy and that a reversal would give no effectual relief to the defendant. The Court added that the defendant could not insist upon a decision merely to determine the issue upon which of the parties to the litigation the costs should devolve.

The case of Richardson v. McChesney, 218 U. S. 487, 54 L. Ed. 1121, 31 S. Ct. 43, came to this Court upon a writ of error to reverse a decree of a state court refusing to require a state official of Kentucky, when certifying the names of nominees for Congress to the Clerks of the various County Courts, to proceed under the Kentucky Apportionment Act of April 15, 1882, rather than under the act of March 12, 1898, which was attacked as invalid. The election affected by the decree had been held, and the persons elected had taken their seats. This Court dismissed the writ and said:

"The duty of the Court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions, however

such opinion might influence future action in like circumstances."

In the case of Jones V. Montague, 194 U. S. 147, 48 L. Ed. 913, 24 S. Ct. 611, this Court had under consideration a writ of prohibition to prevent a Board of State Canvassers in Virginia from canvassing election returns, declaring the results and giving certificates of election to the parties found to be elected, upon the ground that the election was void. A lower court had denied the writ. A motion was made to dismiss the case upon the ground that everything sought to be prohibited had been done after dismissal in the lower court. This court granted the motion on the ground that any adjudication the court might make would only be ineffectual decision of the question, whether or not petitioners were wronged by what had been fully accomplished.

In Wingert v. First National Bank of Hagerstown, 223 U. S. 670, 56 L. Ed. 605, 32 S. Ct. 391, this court dismissed an appeal from a Circuit Court of Appeals which had dismissed a bill to restrain the erection of a bank building, upon the ground that the act was ultra vires, and commercially unwise. During the pendency of the case, the new building had been constructed. The Court pointed out that if the defendants, by their acts, had inflicted an actionable wrong upon the plaintiffs, the bill would be retained for the assessment of damages. No such wrong having been inflicted, the appeal could be considered as being prosecuted for costs only, and, therefore, must be dismissed.

The case at bar differs from Southern P. T. Co. v. Interstate Commerce Commission, 219 U. S. 489, 55 L. ed. 310, 31 S. Ct. 279 (cited in appellant's brief). In that case collateral rights of the parties dependent upon its decision

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would have been left undetermined. In the instant case, no such collateral rights exist. The alleged fear of the appellant that the City Council of Beloit may at some future time revoke the amended ordinance and thus deprive him of a license, whether it exists or not, and whether or not it is justified, if it does exist, is not a collateral right as described in the Interstate Commerce Commission case. In that case it was pointed out that both the Government and the carriers might have their rights determined by the Commission in the future, without a chance of redress. The appellant, Lawrence Dyer, will always have redress in the courts. If he does not wish to commence a future action in the State courts of Wisconsin, he may commence an action in the appropriate Federal Court.

II.

THE CASE AT BAR DOES NOT FALL WITHIN THE EXCEPTIONS TO THE RULE THAT MOOT CASES WILL BE DISMISSED.

In Willis v. Buchman, ... Ala. ..., 199 So. 892, 132 A. L. R. 1179, the Supreme Court of Alabama, in considering whether a case was moot, said:

> "There is no doubt of the general rule that if pending an appeal 'appellee . . . does, or relinquishes the right to do, some act in respect to which the appeal was taken,' the appeal should be dismissed. Caldwell v. Loveless, 17 Ala. App. 381, 85 So. 307; 3 Am. Jur. 308, section 733; 4 Corpus Juris Secundum, Appeal and Error, p. 1955, Par. 1354, f, page 1967, Par. 1362; Alabama Power Co. v. City of Sheffield, supra.
>
> "As to this there is no controversy. But it is contended that this situation is within the exceptions to such rule. There are two exceptions to it, (1) is where, if no decision of the question is made on the

appeal, collateral rights of the parties dependent upon its decision will be left undetermined, as settled in the following cases: Southern Pacific Co. et al. v. I. C. C., 219 U. S. 433, 31 S. Ct. 288, 55 L. ed. 283; Boise City Irr. & Land Co. v. Clark, 9 Cir., 131 F. 415; Postal Tel.-C. Co. v. City of Montgomery, 193 Ala. 234, 69 So. 428, Ann. Cas. 1918B 554; Bradford v. State, 226 Ala. 342, 147 So. 182. And (2) where the rights of the public would thereby be affected. Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498, 31 S. Ct. 279, 55 L. ed. 310; Boise City Irr. & Land Co. v. Clark, supra; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; 3 Am. Jur. 310, note 10; 4 Corpus Juris Secundum, Appeal and Error, Par. 1362, p. 1969, note 6."

A moot case may be retained in the appellate court or remanded for the purpose of assessing damages, or to grant the appellant relief for which he has no adequate judicial redress, or to adjudicate existing rights and equities of the parties. In these instances, rights of the parties collateral to the main issue (which is moot) are determined in the litigation and should be settled. Such considerations do not exist in the case at bar. The appellant has accomplished the whole purpose of his lawsuit. He is not entitled to damages. There are no existing rights and equities which require adjudication. While, for the purpose of this motion, he asserts a fear of retaliation upon the part of the City, such fear, even if experienced, is utterly unfounded and does not, in any event, constitute a justiciable controversy in this case.

The appellant advances the novel argument that the appellees have placed in issue the rights of the public, because their counsel, in a brief filed herein, asserted that it was in the interests of the Beloit public that the ordinance (before its amendment), be upheld. We find no adjudi-

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cated case holding that the arguments of counsel can bring a case within the exception to the general rule that courts will, in some instances, adjudicate an abstract question where the rights of the public are affected. It has been held, however, that the mere statements by counsel do not make a question moot. Habirshaw Electric Cable Co. v. Habirshaw Electric Co., Inc. (C. C. A. 5th), 296 F. 875, 43 A. L. R. 1035. Whether the case at bar involves a controversy of great public interest, in the sense in which the term is used, must depend upon the facts in the case, and not upon the statements of counsel.

The author of the annotations contained in 132 A. L. R. on page 1188, makes the following statement:

> "It is not easy to state any hard and fast rules by which questions are of sufficient public interest to justify refusal to dismiss an appeal which has become moot or which the parties wish to have dismissed may be distinguished from questions which are not of such interest, since the matter rests generally in the discretion of the appellate court in each particular case. Some general considerations bearing upon the problem may, however, be pointed out.
>
> "In the first place it must be remembered that the general rule is to dismiss an appeal which has become moot or which the parties desire to have dismissed, and that the retention of such an appeal because of the public interest therein is an exception to that rule. Hence the inclination of the courts is to refuse dismissal on this ground only under exceptional circumstances and where the public interest clearly appears."

The mere fact that the validity or construction of a statute or ordinance is involved in an appeal is not generally regarded as sufficient in itself to justify or require that a dismissal be refused. Willis v. Buchman, supra;

State ex rel. Traub v. Brown (1928, ... Del. ..., 197 A. 478; Riley v. Bell (1915), 184 Ind. 110, 109 N. E. 843; Coke v. Shanks (1927), 218 Ky. 402, 291 S. W. 362; Re Norton (1899), 158 N. Y. 130, 52 N. E. 723; Love v. Griffith (1922; Tex. Civ. App.), 236 S. W. 239.

There are no exceptional circumstances in this case which require an adjudication in the public interest. The questions raised call for the application of general principles of constitutional law. The amendment to the ordinance has made their application a mere matter of abstract interest. There are no public rights which require protection.

III.

THE APPELLANT IS NOT ENTITLED TO DECLARATORY RELIEF.

While the appellant might have commenced an action under the Declaratory Judgments Act of Wisconsin, he did not do so. Had he done so, it would have been necessary for him to join in the action the Attorney General of Wisconsin as a party in interest. Section 269.56 (11), Wisconsin Statutes 1947. He is, therefore, not entitled to a judicial consideration of a prayer for a declaratory judgment under Wisconsin law, unless all parties in interest have been joined. State ex rel. Joyce v. Farr, 236 Wis. 323, 295 N. W. 21.

The Supreme Court of Wisconsin, in the case of Heller v. Shapiro, 208 Wis. 310, 242 N. W. 174, held that the declaratory judgment statute of Wisconsin justifies a declaration of rights only upon an existing state of facts, not one upon a state of facts that may or may not arise in the future. This appears to be the general rule in the United States. 87 A. L. R., page 1206.

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In the case of State ex rel. LaFollette v. Dammann, 220 Wis. 17, 264 N. W. 627, the Supreme Court of Wisconsin held that one of the conditions which must exist in order that declaratory relief may be obtained is that there must exist a judiciable controversy—that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it. The appellees in the case at bar no longer have any interest in contesting appellant's claim to a license, which he has already received and is enjoying.

The case of Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 77 L. ed. 730, 736, 53 S. Ct. 345, is not in point. The narrow question there presented was whether an action commenced under a Declaratory Judgments Act of a State could be entertained in this Court.

There is clearly no merit in appellant's contention that he is entitled to a declaratory judgment in this Court.

It is submitted that the motion of the appellees herein to dismiss the appeal from the judgment of the Supreme Court of Wisconsin should be granted upon the ground that the cause is moot.

Respectfully submitted,

J. ARTHUR MORAN,
Delavan, Wisconsin,
Attorney for Appellees.

EARL J. CASKEY,
Beloit, Wisconsin,
Of Counsel.